# Central Law Journal.

ST. LOUIS, MO., FEBRUARY 15, 1901.

In First National Bank v. McEntire, recently decided by the Supreme Court of Georgia, was involved a somewhat novel question as to the question of usury and national banks. It is, and has been, for some time, the law of that State that a surety who signs a promissory note containing a waiver of homestead and secretly tainted with usury, of which latter fact he had no knowledge at the time of signing, is discharged from liability. Denton v. Butler, 99 Ga. 264, 25 S. E. Rep. 624, and cases cited. The reason is that the usury made the waiver void, and thus rendered the surety's risk greater than it would otherwise have been. But the court held that this doctrine does not apply where the note is payable to a national bank, the penalty imposed by the United States statutes upon national banks for charging usury being exclusive, and therefore a surety on a promissory note given to a national bank under such circumstances as before stated is not discharged from liability, as his risk has not been increased. The court cites with approval, Bank v. Dearing, 91 U. S. 29; Oates v. Bank, 100 U. S. 239; Bank v. Pratt, 115 Mass. 539; Davis v. Randall, 115 Mass. 547; Brown v. Bank, 72 Pa. St. 209; Bank v. Garlinghouse, 22 Ohio St. 492; Wiley v. Starbuck, 44 Ind. 298; Bank v. Childs, 133 Mass. 248; Bank v. Myers, 74 N. Car. 514; Oldham v. Bank, 85 N. Car. 240; Higley v. Bank, 26 Ohio St. 75; Barker v. Bank, 59 N. H. 310; Bank v. Littell, 46 N. J. Law, 506; Bank v. Schwenk (Neb.), 64 N. W. Rep. 1073; Florence R. & Imp. Co. v. Chase Nat. Bank, 106 Ala. 364, 11 South. Rep. 720; Slaughter v. Bank, 109 Ala. 157, 19 South. Rep. 430; Hill v. Bank, 56 Vt. 582; Rockwell v. Bank (Colo. App.), 36 Pac. Rep. 905.

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On January 28th, 1901, the Supreme Court of the United States handed down an opinion in a case of quite unique importance, being an original suit brought directly in the supreme court, in which the State of Missouri appears as the complainant and the State of Illinois, defendant, together with the Sanitary District of Chicago. The ground of complaint was that the opening of the Chicago drainage canal, by cutting through the natural water-shed and connecting Lake Michigan with the head waters of the Illinois River, constituted a nuisance for the reason that the Sanitary District of Chicago, an agency of the State of Illinois, intended to make use of said canal for draining the sewage matter and filth of the city of Chicago into the Mississippi River, and thus endanger the lives and health of the people of Missouri, and causing incalculable damage to the business interests of the State by the poisoning and pollution of the said waters of the Mississippi by the unnatural and artificial methods adopted by defendant. Defendant filed a demurrer, alleging as a ground that the supreme court had no jurisdiction of either the parties to or of the subject-matter of this suit, because it appeared from the face of said bill that the matters complained of did not constitute, within the meaning of the constitution, any controversy between the State of Missouri and the State of Illinois or any of its citizens; nor was there any property right involved in this suit as would give this court original jurisdiction of the cause. The court overruled both points of the demurrer, holding that it had original jurisdiction of the parties and the cause, and that the complaint stated good ground for equitable relief. Judge Shiras, who delivered the opinion, said in part: "An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved nor of direct property rights belonging to the complainant State. But it must surely be conceded that if the health and comfort of a State are threatened the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she would seek a remedy by negotiation, and that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy, and that remedy we think is found in the

constitutional provisions." In regard to the objection that the State of Illinois should not have been make a party to the case the court was unable to see any force in the suggestion, saying: "The object of the bill is to subject this public work to judicial supervision upon the allegation that the method of its construction and maintenance will create a continuing nuisance dangerous to the health of a neighboring State and its inhabitants. Surely in such a case the State of Illinois would have a right to appear and traverse the allegations of the bill, and having such a right might properly be made a party defendant." Chief Justice Fuller, with whom concurred Justices Harlan and White, dissented. The substance of their dissent may be stated in the following words of Chief Justice Fuller: "Controversies between the States of this Union are made justifiable by the constitution, because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked it must appear that the States are in direct antagonism as States, while this bill makes out no such state of case. The Sanitary District was created by an act of the General Assembly of Illinois, and the only authority of the State having any control and supervision over the channel is that corporation. Any other control or supervision lies with the law making power of the State of Illinois, and I cannot suppose that the complainant seeks to coerce that. It is difficult to conceive what decree could be entered in this case which would bind the State of Illinois or control its action. Assuming that a bill could be maintained against the Sanitary District in a proper case, I cannot agree that the State of Illinois would be a necessary or proper party."

## NOTES OF IMPORTANT DECISIONS.

CONTRACT—BAILMENT—COLD STORAGE—TEMPERATURE REQUIRED.—In Allen v. Somers, decided by the Supreme Court of Errors of Connecticut, it was held that where plaintiffs kept a cold-storage room, and not a freezer, and this was known to defendants when they intrusted their goods to plaintiffs, the latter, in the absence of contract to the contrary, were bound to keep the temperature of their room not at that of a freezer, but only at the ordinary cold of storeroom temperature, no matter what the character of the goods accepted. The court said in part:

"It appears by the finding that there are two kinds of storage rooms in use, where goods of a perishable nature are accustomed to be stored for keeping, one known as a freezer and the other as a cold-storage house or room, and that the temperature of the freezer is ordinarily kept much lower than that of the cold-storage room. The plaintiffs kept a cold-storage room and not a freezer, and this was known to the defendants when they intrusted their property to them. The claim of the defendants in the court below, as we understand it, was, in effect, that unless the plaintiffs kept the temperature of their storage room at the temperature of a freezer, they had not used the care and the diligence required of them. If such a duty rested upon the plaintiffs, it was imposed either by law or by the agreement of the parties. No claim is or can be made in the case, as it stands, that such a duty was imposed upon them by agreement. No such claim is set up in the pleadings. Even if we assume, as the defendants claim, that the somewhat meager allegations of the counterclaim on this point are helped out by the allegations of the complaint, still, at most, the counterclaim only alleges that the goods were intrusted to the plaintiffs to be kept in cold-storage as bailees for hire. There is no allegation that the plaintiffs assumed any other duty towards the defendants than that which the law imposed upon them as cold-storage bailees for hire. If, then, the duty to keep their room at the temperature of a freezer did not rest upon the plaintiffs by specific agreement, did the law, under the circumstances, impose upon them any such duty? We think not. The general rule is that a bailee of goods to be kept for hire must, in keeping them, exercise that degree of care and diligence which may reasonably be expected from a person of ordinary prudence in his situation. Bradley v. Cunningham, 61 Conn. 485-496, 23 Atl. Rep. 932, 15 L. R. A. 679. This general rule may, of course, be varied by agreement. The case at bar falls within the general rule. The duty of the plaintiffs was to keep the temperature of their room at the ordinary cold-storage room temperature. The law, under the circumstances of this case imposed that duty upon them, in the absence of specific agreement otherwise; and this was the only duty that rested upon them, so far as the temperature of the room was concerned. This duty they fully performed. They did not engage to keep the goods in a freezer, and were not liable for not doing so."

NEGLIGENCE—FIRE SET ON RIGHT OF WAY—INJURY TO CHILD.—A late issue of the *New York Law Journal* calls attention to the fact that the New York courts have not adopted the so-called

doctrine of the "turntable cases" and remarks that the logic of their position is indirectly upheld by the necessity which courts that have adopted such doctrine have been under to strictly, and sometimes arbitrarily limit its application. A recent illustration I. says is furnished by the Supreme Court of Minnesota in Erickson v. Great Northern Ry., 84 N. W. Rep. 462. It appeared that the defendant set fire to stumps and rubbish on its right of way, and plaintiff's intestate, a child 4 years old, went to the fire, and while playing with it she was burned so that she died. The action was brought to recover damages for her death, on the ground that the right of way was not fenced, and also on the ground that the defendant left the fire unguarded. It was held: "1. That the complaint does not allege any facts showing that the child went upon the right of way at any point which it is alleged was unfenced, or at any point which the defendant might lawfully have protected by a fence. 2. That, as a general rule, the doctrine of Keffe v. Railway Co., 21 Minn. 206, should be limited in its application to cases of attractive and dangerous machinery and to other similar cases where the danger is latent. 3. That the defendant was not bound to exercise due care to so guard the fire on its right of way that children intruding thereon could not come in dangerous contact with the fire, though induced so to do by its attractiveness." The court said in part:

"In Emerson v. Peteler, 35 Minn. 481, 29 N. W. Rep. 311, which was a case where a child 5 years old was killed by climbing upon a portable dump car, the court declined to apply the doctrine of the Keffe case (a turntable case), and stated that the basis of liability in the latter case was that the premises were such as to invite the presence of children, and the danger was not apparent, but concealed. In Twist v. Railroad Co., 39 Minn. 164, 39 N. W. Rep. 402, the court stated the necessity of limiting the doctrine in these words: 'To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents of the children themselves. This court itself, if it has not modified the Keffe case, has at least indicated that the doctrine which it announces is not to be given any such extreme and unlimited application.' In Haesley v. Railroad Co., 46 Minn. 233, 48 N. W. Rep. 1033, the court held that a railroad company was not guilty of negligence, as to young children, by leaving cars on a gravity track, with the brakes set, which were loosened by them, whereby one of their number was killed. Again, in the case of Ratte v. Danson, 50 Minn. 450, 52 N. W. Rep. 965, it was held that a landowner was not liable in damages for the death of a child 3 years old, caused by the caving of an unguarded embankment on his premises made by excavations for sand. In Stendal v. Boyd, 73 Minn. 53, 75 N. W. Rep. 735, 42 L. R. A. 288, the court refused to extend the doctrine of a turntable case so as to include an unguarded pond caused by the excavation in a stone quarry which had been abandoned. The court in that case said: 'The liability of a landowner to children who are induced to come upon his premises by reason of attractive and dangerous machinery thereon was carefully limited in the original decision, and the limitations have been enforced by the subsequent decisions of this court. The doctrine of the turntable cases is an exception to the rule of non-liability of a landowner for accident from visible causes to trespassers upon his premises. If the exception is to be extended to this case, then the rule of non-liability as to trespassers must be abrogated as to children, and every owner of property must, at his peril, make his premises child proof. * * * It would seem that there is no middle ground, and that the doctrine of the turntable cases ought to be limited to cases of attractive and dangerous machinery.' The suggested limitation necessarily had no reference to cases where the danger was not open, but concealed. This court also refused to extend the doctrine to a case where a child was injured by falling from an unguarded retaining wall seven and a half feet high. Kayser v. Lindell, 73 Minn. 123, 75 N. W. Rep. 1038. It is not practicable to lay down any absolute rule as to the limitations of the doctrine. The manifest trend, however, of all the decisions of this court is to limit its application to attractive and dangerous machinery, and to other similar cases where the danger is latent. We are not prepared to say that cases may not arise outside of this classification to which the doctrine ought to be extended, but we do hold that as a general rule the doctrine of the turntable cases must be limited to cases of attractive and dangerous machinery, and to other similar cases where the danger is latent. This rule may not be strictly logical, but it is a necessary one, unless landowners are to be made insurers of the safety of children when trespassing upon their premises."

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DEATH BY WRONGFUL ACT — DEATH OF ILLEGITIMATE CHILD—MOTHER'S RIGHT TO SUE.—In Alabama & Vicksburg Ry. Co. Williams, 28 South. Rep. 853, decided by the Supreme Court of Mississippi, it was held that under Acts of 1898 of Mississippi, p. 83, authorizing the widow, husband, father or mother of a decedent to bring an action for damages for wrongfully causing his death, a natural mother cannot maintain an action against a railroad company for the death of an illegitimate son, caused by its negligence.

The court said in part:

"In Edwards v. Goulding, 38 Miss. 165, our court announces the rule of strict construction, which runs through all our reports, of all statutes making innovations of the common law and applies that rule of construction to a statute conferring rights of illegitimates. That statute was that 'hereafter all illegitimate children shall inherit the property of their mothers, and from each other,' etc.; and the court held that even the legitimate children of a bastard dying before the act could not inherit from an illegitimate uncle or aunt dying after its passage. Previously to this decision our court had been equally as explicit in Porter's Heirs v. Porter, 7 How. 110, 111. It holds that bastards are not comprehended under the word 'children' in our statute of descents; that those born out of wedlock are not numbered among children; that the word 'children,' in a will, where there were both legitimates and illegitimates, means legitimate children only; that illegitimates could not be the 'stock through which consanguinity could be traced;' that they could not inherit from their mother; and that 'it is the policy of the law to sustain the institution of marriage, as the surest and safest groundwork on which society can rest, and to make that the only source from which inheritable blood can flow.' Discussion might well end here, on the decisions of our own State. But the doctrine is settled in the same way in nearly all the States, if not all, which treat of it. In Vermont a statute gave a right of action to any one 'in any manner dependent on' a person injured or dying by intoxicating liquors against the seller of the intoxicant. In Good v. Towns, 56 Vt. 410, a man named Good died from intoxicating liquor, and Mary M. Good sued the seller, averring that she had lived with Mr. Good as his wife, but not in lawful wedlock, for many years, and had borne him eight children, and that he had acknowledged them as his, and her as his wife, in the community, though he was, in fact, married to another woman, who lived in Massachusetts, and who had long before been through the ceremony of marriage with another man. Mary M. Good was joined in her suit by an illegitimate minor daughter of her unlawful connection with Mr. Good, also dependent on him for support. The court denied relief on the ground that the legislature, by the word 'dependent,' meant 'legally dependent,' which could not refer to an adulteress or an illegitimate, without express mention, and that the act, being an innovation on the common law, must be strictly construed, and so as not to violate the public policy of discouragement of illicit intercourse. This is an extreme case, but the ruling was manifestly right. In McDonald v. Railway Co., 144 Ind. 459, 43 N. E. Rep. 447, 32 L. R. A. 309, 310, Judge Monks collates the authorities on this subject, and they practically speak one voice. Last year the whole doctrine was commented on in Railroad Co. v. Cooper, 22 Ind. App. 462, 53 N. E. Rep. 1092 *et seq.* with full approval. See also Blair v. Adams (C. C.), 59 Fed. Rep. 243, 5 Am. & Eng. Enc. Law (new Ed.), 1095; Williams v. Kimball (Fla.), 16 South. Rep. 783; and also the authorities cited in the briefs of counsel on both sides in the case at bar, and in the briefs and opinion in Railroad Co. v. Johnson, 77 Miss. 727. If anything can be said to be settled on reason and authority, it is that statutory rights of action given kindred for injuries done another do not embrace illegitimate kindred without express mention. Legislation must be presumed to be enacted in the light of the common law, and not to give or enlarge rights denied at common law to a class separated by it from the common mass without express mention.

"Counsel cite Marshall v. Railroad Co., 129 Mo. 275, 25 S. W. Rep. 179, where the right of the mother of a bastard to sue for his death was sustained. It will be seen on page 282, 129 Mo. page 181, 25 S. W. Rep., that the opinion in fact rests on two statutes of the State of Missouri, the first declaring the mother to be the natural guardian of her illegitimate child. We have no such statute in Mississippi. The second declares that the mother may inherit from her bastard child. We have no such statute in Mississippi. Here the mother of a bastard cannot inherit from him. Now, if we turn to the statute under which appellee sued (Acts 1898, p. 83), we see that it refers to the 'widow, husband, father, mother, sister, brother' of deceased; and we hold that it refers only to the legal widow, husband, father, mother, sister, brother, because illegitimates are not expressly included. People unmarried can leave no widow, husband, father, mother, sister, brother, because they could have none at common law, and no statute enables them to have either. The collocation shows that legitimates only could have been referred to. Certainly the putative father was not meant, and the adulterer or adulteress could not be meant under the terms 'husband or widow;' and we can imagine no process of reasoning by which the courts can interpolate the words 'whether legitimate or illegitimate' before the words 'father, mother, sister or brother.' Courts can only pronounce what the law is, not what they think it ought to be."

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ADULTERATION OF FOOD—SALES—CONSTITUTIONAL LAW—INTENT.—The Supreme Court of Iowa holds, in State v. Schlenker, 84 N. W. Rep. 698, that Code, Iowa, § 4989, declaring that if any person shall sell any adulterated milk he shall be fined, and section 4990, providing that for the purpose of this chapter the addition of water, or any other substance or thing, to milk is an adulteration, are to be construed literally, and not as merely prohibiting sales of something which operates as a fraud on the buyer or proves deleterious to his health; that the said act is not unconstitutional, as invading the province of the judiciary, and that it is within the police power of the State to prohibit the sale of adulterated

milk, though there be no fraud or deceit in the sale and the adulteration in certain cases be harmless, and that no knowledge or intent being required by the statute, no criminal intent need be proved. The court said in part:

"But it is said that the legislature had no power to forbid the sale, without deceit or fraud, of a harmless and wholesome article of food. This may be true, as a general proposition; but it is also true that in virtue of the police power it may pass such laws as are, or may reasonably appear to be, necessary for the health, comfort, and safety of the people. No clear and comprehensive definition of the police power has ever been given, and it is doubtful if one can be framed that will be accurate and cover every conceivable case that may arise. It is much easier to determine whether the particular case comes within the scope of the power than to give a definition that will be applicable to all cases. In Railroad Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527, it is said: 'The police power of a State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the State, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.' The power belongs to the several States, and not to the federal government, save in exceptional cases; and, so long as the legislature does not pass the limits prescribed by the federal or State constitutions, courts have no authority to interfere on the ground that the acts in question violate natural principles of right and justice. Ordinarily the legislature determines when the public welfare and safety demand its exercise; and, as a general rule, courts have nothing to do with the policy, wisdom, or necessity of the enactment. Of course, the State cannot, by arbitrarily assuming that a commodity is injurious to the health or comfort of the people, impair individual rights guaranteed by the constitution. The police power of the State, like every other, is subject to the constitution, and cannot be used as a cloak under which to disregard constitutional rights or restrictions. Railroad Co. v. Husen, *supra; In re* Jacobs, 98 N. Y. 98. The question is, of necessity, primarily with the legislature, and its decision should not be lightly disregarded by the courts. Courts will not interfere, as a rule, unless there is a plain excess or usurpation of power, and in case of doubt it should be solved in favor of the power of the legislature to make the enactment. It was an indictable offense at common law to mix unwholesome ingredients, such as alum in bread, or to mix unwholesome substances in anything intended for the food of man. There is an ancient statute, St. 51, Hen. III., prohibiting the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew. 4 Bl. Comm. 162. In Rex v. Dixon, 3 Maule & S. 11, defendant was indicted for furnishing bread not fit for food. It appeared that the loaves were strongly impregnated with alum, and that large pieces of crude alum were found in them. Defendant's motion for a new trial, filed after a verdict of guilty, was overruled, the court saying that 'alum being perilous to health, in the form used, it is immaterial that if used in certain quantities it was not noxious, but wholesome.' Statutes enacted to secure the sale of pure food and to prevent adulteration are quite common in this country, and have ever been referred to the police power. See English sale of food and drugs act of 1875, chapter 63; Laws Tenn. 1859–60, ch. 81, § 4; Rev. St. Mass. ch. 181, § 1. They are enacted to prevent fraud and to conserve the public health, and as such are a valid exercise of the police power. State v. Campbell, 64 N. H. 492, 13 Atl. Rep. 585; People v. Arensburg, 105 N. Y. 123, 11 N. E. Rep. 277; Butler v. Chambers, 36 Minn. 69, 30 N. W. Rep. 308; Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. Rep. 604; Powell v. Pennsylvania, 127 U. S. 679, 8 Sup. Ct. Rep. 992, 1257, 32 L. Ed. 253; Com. v. Waite, 11 Allen, 264, 87 Am. Dec. 711; State v. Smythe, 14 R. I. 100, 51 Am. Dec. 343; People v. Cipperly, 101 N. Y. 634, 4 N. E. Rep. 107; Com. v. Gordon, 159 Mass. 8, 33 N. E. Rep. 709; Com. v. Schaffner, 146 Mass. 512, 16 N. E. Rep. 280.

"That the sale of milk to which water and boracic acid have been added may amount to a fraud upon the purchaser is evident. He has the right to assume that the milk he buys is unadulterated, and that it will go through the natural process of oxidation and decomposition. He may wish to use sour milk for culinary purposes, and has the right to assume that nothing has been added to prevent chemical change. Counsel for appellee responds to this thought by saying that defendant notified all persons to whom he sold that boracic acid had been added, and that no one of the witnesses for the State was deceived. The record does not bear them out in this contention, but, even if it did, we would have no help therefrom in solving the constitutional question involved. It may be conceded that the milk sold by defendant was not harmful to the health of those who used it; but it is certainly dangerous to the public to permit milkmen and those dealing in milk to adulterate it in such manner as to change its constituent properties. The statute does not deprive the defendant of his property, but it does impose upon him the duty of so using it that no injury shall result to others, most likely to be affected by a disregard on his part of the reasonable health regulations that it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but these rights are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable regulations as the legislature, under the constitution, may deem necessary and expedient. In the Schaffner case, from Massachusetts, and the Campbell case, from New Hampshire, it is ex-

pressly held to be immaterial whether the foreign matter is or is not injurious to health. The court in the latter case said that, 'if the legislature has power to fix a standard, it must judge whether or not milk below that standard is unwholesome;' and in the former it was held that the addition of pure water to milk was an adulteration punishable under the statute. In Com. v. Gordon, *supra*, it is expressly held that the addition of boracic acid to cream is an offense under the statute of the State of Massachusetts. See also Com. v. Wetherbee (Mass.), 26 N. E. Rep. 414. In Com. v. Waite, 11 Allen, 264, 87 Am. Dec. 711, the exact question made by defendant in this case was decided, the court using the following language: 'It is innocent and lawful to sell pure milk, and it is innocent and lawful to sell pure water; and the argument is that the legislature has no power to make the sale of milk and water when mixed a penal offense, unless it be done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency.' It is not enough to show that defendant did not intend to defraud, or that the milk he sold was wholesome. If that were true, almost any law intended to protect the public health and safety might be overthrown. It is enough that adulteration such as prescribed by the statute may defraud or prove deleterious to the public health or comfort. The legislature may well determine that the adulteration of milk tends to facilitate vicious practices, and that it ought to be prohibited. To defeat the act prohibiting such conduct, it is not enough to show that in the particular case the article sold was innocuous. Criminal intent is not an essential element of the offense described in the statute, and need not be shown in order to justify a conviction. Com. v. Smith, 103 Mass. 444; Com. v. Farren, 9 Allen, 489; Com. v. Nichols, 10 Allen, 199; People v. Kibler, 106 N. Y. 321, 12 N. E. Rep. 795; State v. Smith, 10 R. I. 258. If the statute required knowledge or intent, of course these matters should be shown. These propositions are a sufficient answer to the opinion of the trial court, holding that an intent to defraud is necessary.

"Appellee further contends that the statute in question is in violation of the fourteenth amendment to the federal constitution. Such contention is not sound, for it is fundamental that this amendment does not impose any restraints on the exercise of the police power of the State for the protection of the safety, health, or morals of the community. Barbier v. Connoly, 113 U. S. 27, 5 Sup. Ct. Rep. 371, 28 L. Ed. 923; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. Ed. 346; *In re* Rahrer, 140 U. S. 545, 11 Sup. Ct. Rep. 865, 35 L. Ed. 572; People v. King, 110 N. Y. 418, 18 N. E. Rep. 245. The conclusion of the learned trial judge was made to depend almost wholly on the facts developed by the evidence. If the jury had found the milk as adulterated,—unwholesome,—we have no doubt that the trial court would have sustained the convictions. That the constitutionality of a statute ought not to be made to depend on the finding of a jury on the facts of a case is manifest. If the plain provisions of the constitution have been violated, or if the act cannot be said to be a proper exercise of the police power, in view of facts of which judicial notice may be taken, then the duty of declaring the act invalid is clear. But, in the absence of such finding, the act should stand. Ordinarily it cannot, we think, be a question of fact for a jury. See People v. Cipperly, *supra;* People v. Smith (Mich.), 66 N. W. Rep. 382. People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29, is relied on by appellee. That case involved the right to sell oleomargarine, and not the question of adulteration. That it is not in conflict with anything we have announced, clearly appears from the Cipperly case, in 101 N. Y. 634, 4 N. E. Rep. 107. See also People v. Arensburg, 103 N. Y. 388, 8 N. E. Rep. 736. Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. Ed. 49, involved the commerce clause of the federal constitution; and it was held that the legislature could not, under the guise of the police power, absolutely prohibit the sale of articles which are the subjects of interstate commerce. It does not overrule Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. Ed. 253, or Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. Ed. 223; and, as those cases sustain our holding, we may well rest thereon."

## COMPENSATORY DAMAGES FOR MENTAL SUFFERING.

Mental suffering is briefly dismissed, by many of the authorities, as constituting an injury too vague and uncomprehensive to become an element in the award of damages of a compensatory nature. Earlier decisions, while tacitly acknowledging the equity of compensation for injury, even though it be of a nature peculiar to the mentality of a sentient being, have, as a rule, avoided the question, and have based the award upon injuries of a physical or pecuniary nature. A prominent instance of this line of decisions is the general form of action by a parent for the

seduction of a daughter. In such cases recovery is based upon the loss of services, and the most trivial of filial duties has been magnified into the necessary foundation for the action. Rarely, indeed, has the award confined itself to a recovery for the actual damage sustained through the loss upon which the action itself was based. The position of the complainant, the ensuing degradation, in short, the mental sufferings involved, have been the most prominent factors in the estimation of damages. Indeed, in cases of this nature, it seems perfectly clear that the parents' anxiety and distress of mind may form an element for consideration in the award of compensation.[1] It is not denied that the consideration of mental distress, as a subject of compensatory damages, appears to open the door for the practice of fraud. It may be said that the anguish of mind of one cannot be properly estimated by another, and yet, in an action for breach of promise of marriage, this same mental condition is frequently a most prominent element in the award of compensation. Modern jurists, too, have shown a marked tendency to base recovery upon the actual injury sustained rather than upon a foundation to a certain extent artificial. Sedgwick says:[2] "The allowance of exemplary damages gave rise for a time to the notion that mental suffering is not a subject for compensatory damages. This notion has been generally abandoned; in Massachusetts, where exemplary damages are not allowed, the right to recover damages for mental suffering has always been recognized." As to the right to recover for anguish of mind, where the question of pecuniary injury is eliminated, Berkshire, J.,[3] stating clearly the trend of modern decision, says: "Some of the authorities seek to draw a distinction as to the right to recover damages for mental suffering between cases where there may be a recovery for pecuniary loss, and cases where there is, or can be, no pecuniary loss. With this distinction we have no sympathy, and confess that we can see no good reason for it to rest upon." In cases arising *ex contractu*, the majority of decisions have been rendered in suits against somewhat modern creations—telegraph companies. In such actions eliminating any special form of contract, and considering only cases where a message is received under a simple agreement, express or implied, calling for prompt transmission and speedy delivery, reason, and the proper protection of the contractual rights of the complaining party, would seem to demand a recovery of more than merely nominal damages for a breach of the contract.[4]

There can be no question in such cases of the plaintiff's right to recover whatever pecuniary damages he may have sustained. Where, however, the breach of contract is one productive of injuries purely mental, then logical reason would demand that a jury be permitted to award fair compensation for the natural and proximate damage sustained, and lack of commercial value should in no way influence the award.[5] In contemplation of law, every infraction of a contractual right causes an injury that may be compensated for in damages. In cases of this nature, where a party fails to perform his contract, or delays in doing so, for it must be admitted that time is an essential in contracts of this kind, then he is certainly liable in some degree. There are many cases where an injury to the feelings is of greater moment, productive of greater suffering and injury than one of a purely physical or pecuniary nature. For example: Where the negligent delay in the transmission and delivery of a telegraphic message denies a sister the opportunity of attending her brother in his last illness, and prevents her from making the necessary preparations for his funeral.[6] Where breach of contract leaves a husband in ignorance of the dangerous illness of his wife, the parent of the child, the brother of the sister, it is not to be supposed that the injury can be compensated for by merely nominal damages.[7] Injury has been sustained through the wrongful act of the party complained of, and the plaintiff should be permitted to recover for all the damage arising from such act.[8] Deny the right to re-

[1] Phillips v. Hoyle, 5 Gray, 568; Stevenson v. Belknap, 6 Iowa, 97; Lunt v. Philbrick, 59 N. H. 59.
[2] 1 Sedgwick on Damages (8th Ed.), sec. 356.
[3] Reese v. W. U. Tel. Co., 123 Ind. 294.
[4] Chapman v. W. U. Tel. Co., 13 S. W. Rep. 880.
[5] Wadsworth v. W. U. Tel. Co., 86 Tenn. 695; Shearman & Redfield on Negligence, sec. 606.
[6] Wadsworth v. W. U. Tel. Co., 86 Tenn. 695; Young v. W. U. Tel. Co., 107 N. Car. 370.
[7] Reese v. W. U. Tel. Co., 123 Ind. 294.
[8] Chapman v. W. U. Tel. Co., 13 S. W. Rep. 880.

cover for injury to the feelings, for distress of mind, for suffering peculiar to the mentality of a sentient being. Do not permit the injured party to look to the wrongdoer for compensation for anguish purely mental, and contractual rights resulting in this species of injury may be violated with impunity. In short, a degree of care will have to be exercised only in cases liable to result in damage of a pecuniary nature. This does not seem to be the true rule. Holt, J., in Chapman v. W. U. Tel. Co.,[9] says: "Whether the injury be to the feelings or pecuniary, the act of a violator of a right secured by contract has caused it. The source is the same and the violator should answer for all the proximate damages." It is not denied that it is most difficult to estimate the pecuniary value of damages of this nature, but, inasmuch as mental distress is the primary element of injury in cases of slander,[10] it would seem possible to compute the monetary recompense in cases where injury to the feelings is the sole damage sustained. It is to be noted, however, that care must be observed in order that the grief occasioned by the natural injury be not confounded with the mental anguish caused by the negligence of the wrongdoer.[11] Moreover, the injury complained of must be the direct, probable and proximate result of the act of the wrongdoer,[12] and the defendant must have been put upon inquiry, either by the language of the message,[13] or by attendant circumstances, as to the likelihood of such mental injury resulting from failure or delay in the performance of the contract,[14] nor can more than ordinary diligence in the fulfillment of the contract be expected.[15] It is not necessary that mental anguish be incidental to bodily pain. What distinction can exist? The true basis of recovery is that the damage sustained is the direct and obvious result of the act of the wrongdoer, that it is contemplated in the performance of the wrongful act, that it is the proximate result of the failure to perform a duty. Why, then, should it be essential that mental, should accompany physical, suffering? No such distinction can exist. If the party complained of be put upon inquiry as to whether his negligence is likely to result in injury to the other party, then he is liable for whatever damage, mental or otherwise, that shall result from his wrongful act.[16]

Eliminate, then, the question of contract, and consider the question of recovery for mental suffering as it arises in actions *ex delicto*. In such cases it is generally conceded that pain and anguish of mind consequent upon physical injury may be taken into consideration in the assessment of damages,[17] though it has been held an error so to instruct the jury unless the injury complained of is willful.[18] It is interesting to note, however, that this ruling is based upon the rule in 2 Greenleaf on Evidence, sec. 267, and that this author relies, for the support of his proposition, upon the case of Canning v. Williamstown,[19] a case which not only does not support his statement, but rules directly to the contrary. Indeed, the majority of the decisions permit mental anguish, resultant upon physical pain, to become an element for consideration in the assessment of damages.[20] As to distress of the mind incidental to physical suffering, but not necessarily consequent upon it, the question involved seems to be largely one of proximate cause. If the injury be the direct and natural incident of the mental distress occasioned by the act of the wrongdoer there seems little doubt that compensatory damages would lie.[21] It may be noted that a decision is to be found going even farther toward the modern tendency to allow compensation for anguish of mind. In the case of Cahill v. Murphy[22] it was held that mental suffering is an ele-

[9] Chapman v. W. U. Tel. Co., 13 S. W. Rep. 880.
[10] Republican Pub. Co. v. Mossman, 15 Cal. 399.
[11] Beasley v. W. U. Tel. Co., 39 Fed. Rep. 181.
[12] Loper v. W. U. Tel. Co., 70 Tex. 689.
[13] W. U. Tel. Co. v. Henderson, 89 Ala. 510; Young v. W. U. Tel. Co., 107 N. Car. 370.
[14] W. U. Tel. Co. v. Simpson, 73 Tex. 422; W. U. Tel. Co. v. Adams, 75 Tex. 531; W. U. Tel. Co. v. Feegles, 75 Tex. 537; W. U. Tel. Co. v. Moore, 76 Tex. 66; W. U. Tel. Co. v. Kirkpatrick, 76 Tex. 217.
[15] Chapman v. W. U. Tel. Co., 13 S. W. Rep. 880.
[16] Stuart v. W. U. Tel. Co., 66 Tex. 580; Reese v. W. U. Tel. Co., 123 Ind. 294.
[17] I. & St. Louis R. R. Co. v. Stables, 62 Ill. 513; Peoria, Bridge Assn. v. Loomis, 20 Ill. 235; Canning v. Williamstown, 1 Cush. (Mass.) 451; Taber v. Hutson, 5 Ind. 322.
[18] I. C. R. R. Co. v. Sutton, 53 Ill. 397.
[19] 1 Cush. (Mass.) 451.
[20] Wolf v. Trinkler, 103 Ind. 355; Smith v. Holcomb 99 Mass. 552; West v. Forrest, 22 Mo. 344; Craker v. Chicago, etc. Ry. Co., 36 Wis. 657; Godeau v. Blood, 52 Vt. 251.
[21] Purcell v. St. Paul City Ry. Co., 48 Minn. 134.
[22] 94 Cal. 49.

ment for which damages may be recovered in an action for slander, and such suffering may be increased and the damages consequently enhanced, by the fact that the members of the plaintiff's family suffered by reason of the disgrace vested upon him, or her, owing to the slanderous charge. It seems difficult to conceive an action *ex delicto* where the sole damage complained of should be that arising from mental distress unaccompanied by other injury. The opinion in Canning v. Williamstown[23] states that no damages would lie for mental suffering and fright alone, but this was merely *obiter dictum*, and the leaning of judicial opinion would seem to be in the other direction. Jackson, J., charging the jury in Barbour v. Stephenson,[24] stated that it was to the credit of modern jurisprudence that the law, in an action for the seduction of a child, had advanced sufficiently beyond the relics of barbarism to permit the parent to recover "for all that he can feel from the nature of the injury," and there seems no good reason why the wrongdoer should escape the consequences of his act, whether the injury be of a physical or mental nature. The question of public policy is not discussed upon that point, a ruling must always be, to a certain extent, arbitrary. Viewed, however, from a purely logical standpoint, and taking into consideration the legal principles involved, it would seem that recovery might be had in an action *ex delicto* based upon the damage sustained by reason of mental suffering *per se*. Consider the distress and anxiety of a parent upon reading the unverified report of the death of a child, a statement subsequently proven false. Is this presumed condition of facts any the less a damage to the mentality than that sustained through the negligence of a telegraph company to properly transmit and deliver a message containing news of a similar nature? Is the result of the wrong less proximate, or less probable and natural? Is the wrongdoer, in the latter case, put more upon inquiry as to the result of his wrongful act than in the former? It would seem not. When this phase of the question of compensatory damages for mental suffering is fairly presented for adjudication, the decision, in comparison with the present trend of judicial opinion, must prove of the deepest interest.

Chicago, Ill. G. C. HAMILTON, LL. B.

[23] 1 Cush. (Mass.) 451.

[24] 32 Fed. Rep. 66.

## CONTRACT — PERSONAL SERVICES — DEATH OF PARTY—PUBLIC POLICY.

### BLAKELY v. SOUSA.

*Supreme Court of Pennsylvania, Oct. 8, 1900.*

1. A contract for combination for mutual profit o the business ability of B, as manager, and the musical talent of S, as director, in the organization and touring of a band,—the compensation to be paid S to be a proportion of the profits,—is dissolved by the death of B.

2. Though a contract for combination of the business ability of B, as manager, and the musical ability of S, as director, in the organization and touring of a band provided that a corporation may be formed by B, and the contract assigned to it, the contract does not on this account survive to the personal representative of B on his death, without such corporation being formed.

3. A contract for the use by B of the name of S, a musical director, for the name of a band, without S being connected with it, cannot be enforced, as it would be a fraud on the public.

BROWN, J.: Neither the complainant nor the respondent is satisfied with the decree made in the court below. Each has appealed from it; the former complaining that it gives her too little, and the latter asserting that she gets too much. The appeal of the complainant, though taken later than that of the respondent, will be first considered, as it raises the most important questions to be disposed of. The contract out of which this controversy arose was in writing, having been executed by the parties to it on June 27, 1892; and the obligation assumed by each were to extend through a period of five years from August 1, 1892. Before the expiration of this period David Blakely, one of the contracting parties, died; and the first and most important question is as to the effect of his death upon the agreement and the personal representative insists that the contract was unaffected by his death; that, as his substitute in it, she has succeeded to all his rights unde it, and can compel full performance by Sousa, the survivor. The latter, however, contends that personal services to be rendered by the deceased, who possessed peculiar ability and qualifications, were the inducement that led him to enter into the contract, and that the relations established by it were dissolved by the death of him whose personal qualities had so induced him. The effect of the death of a party to a contract, whose distinctly personal services, involving peculiar skill and experience, are at the foundation of it, in the absence of any provision that the survivor must accept performance by the personal representative of the de-

ceased, is not in doubt. This is settled by reason, and authorities are not wanting in support of it. "All contracts must be construed with reference to their subject-matter, and a contract defining an existing relation can have no operation when that relation ceases, for its formation is gone." Bland's Admr. v. Umstead, 23 Pa. St. 316. "The general doctrine on this point was very thoroughly examined and discussed by my Brother Lowrie, J., in Dickinson v. Callahan's Admrs., 19 Pa. St. 227. The conclusion arrived at there seems to be that if the contract of a decedent be personal, and the performance of the deceased himself be the essence thereof, his executors will not be liable, excepting only so far as the contract was broken during his lifetime; and the instance is given of a contract to impart artistic or mechanical skill and information. Such a contract could not devolve on the representative of the deceased; for, as it was there said, 'we cannot suppose that the deceased was contracting for any kind of skill in his administrator.' " White's Exrs. v. Com., 39 Pa. St. 175. "Where the agreement is for services which involve the peculiar skill of an expert, by whom alone the particular work in contemplation of the parties can be performed, or, more generally, where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract." Billing's Appeal, 106 Pa. 558. "A contract to render such services and perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death a disability which renders performance impossible discharges the contract." Marvel v. Phillips, 162 Mass. 399, 38 N. E. Rep. 1117, 26 L. R. A. 416. The duty of the survivor to a contract of a strictly personal nature to perform his covenants terminates with the death of the other party to it, for the reason that neither of the contracting parties contemplated attempted performance by a substitute. Where distinctly personal services, requiring peculiar skill, are to be rendered by each of the contracting parties as inducements to the contract, there is mutuality, and the death of either of the parties is the death of the contract. In such a case the personal representative of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed and discharged by another.

Turning to the contract before us, what was its nature, and what effect did the death of Blakely have upon it? On its face it sets forth a combination of the business ability of Blakely with the musical talent of Sousa for mutual profit. In its very first lines the purpose of the agreement appears to be the formation of a musical organization of high excellence; the manager of the same to be David Blakely, who had been "the manager of the late tours of the U. S. Marine Band:" and the musical director, John Philip Sousa. Each of the parties to the contract understood the personal qualities of the other, and manifestly regarded them as the inducements to it. Without the business qualities, ability, and experience of Blakely, or the musical skill of Sousa, the organization to be known under the contract as "Sousa's Band" would not have been formed. We find this where we ought to find it—within the contract itself. We there find that David Blakely, styling himself "the manager of the late tours of the U. S. Marine Band," was "desirous of perfecting a new organization, for the purpose of securing high excellence in a military band, and, with that view, to secure the services of John Philip Sousa as its musical director," who was willing, "on the terms set forth in the contract," to accept the postion. The ninth clause of the agreement provides: "The musical direction of the aforesaid organization shall be in the hands of the said John Philip Sousa, and the business management in the hands of said Blakely, as aforesaid; but both shall mutually receive counsel in their respective positions, and especially regarding the preparation of programmes." The fifteenth clause is as follows: "It is agreed that both parties to this agreement shall do all that within them lies to make the enterprise herein contemplated a success, both musically and financially; and, in general, they shall both spare no pains to forward the interests of the busines connected directly or indirectly therewith." Nowhere does it appear that either of the contracting parties contemplated the services of any one else. They, and they alone, by the combination of their personal qualifications, were to strive for the success of the enterprise. Having understood that each relied upon the peculiar qualities of the other, neither bound his executors or administrators; for the death of either would make it impossible for the contract to survive, and, in such a case, "*non tenetur promissor*." Blakely's business qualities and ability as the manager of the band would pass away with him, and Sousa's great skill would not be found in his executor or administrator. The compensation to be paid to Sousa included a proportion of the annual net profits of the enterprise. He was not to receive a fixed compensation at all times, but one which depended upon the success of the enterprise. He agreed to such compensation, feeling that the intelligent business direction of Blakely would make it sufficient, but in no place in his agreement is there any provision on his part that he would trust his profits to the business management of another. This alone ought to be conclusive of his right to insist that no one can be substituted as manager for Blakely. It is true that an assignment of the contract was contemplated by the parties, but only under certain conditions. The words "executors or administrators" cannot be found in it, or any other words indicating an intention that upon Blakely's death his personal representative should take his place. The learned

referee did find as a fact that, before and at the time of the execution of the contract, Blakely and Sousa contemplated the formation of a corporation to be known as "The Blakely Syndicate." It was to be perfected by Blakely, and the clause provided that, if the corporation should not be formed, the contract should be and remain in full force as to both parties to it. "This corporation, if formed, was to succeed, by assignment of the contract, to the rights under it, but no other was to be an assignee. If the contract was to be generally assignable, what necessity was there for this express provision that it might be assigned to the company to be formed by Blakely? The answer must be that the assignability was clearly limited to the corporation to be so formed, and extended to no one else, "*Inclusio unius, exclusio alterius.*" Going outside of the contract, the learned referee properly found that the personal qualities of each of the parties constituted a potential inducement to the making of it. In her bill of complaint, asking for relief, the peculiar skill, business ability, and experience of Blakely, and the character of services which he performed under the contract, are all set forth; and he must have understood when he lived, as his personal representative manifestly does now, that these qualities were the inducement leading Sousa into the contract. The referee was therefore clearly right in holding that the relations which had existed between Blakely and Sousa under the contract of June 27, 1892, and extended by the agreement of September 10, 1896, were teminated by the former's death on November 7, 1896; and the first four assignments of error are overruled.

We come now to a consideration of the right of Blakely's estate to use Sousa's name in connection with musical organizations. It is contended by the complainant that the said name became the property of Blakely, and upon his death passed to his estate. Apart from the absence of any words showing that any part of the contract was assignable, except under the limitation already referred to, the assignment of the name "Sousa" cannot be enforced, for the reason that its enforcement would be against public policy, and enable the assignee to impose upon and deceive the public by inducing them to attend concerts under the impression that they were to be given by Sousa, when in fact he would have nothing whatever to do with them. It is true that the right of a person to use the name of another in connection with a business or a manufactured article passes under an assignment and sale of good will of the business, which includes the right to the trade-name. It has often been held that a trade-mark or a trade-name, representing an article of commerce or a local business, is property which may disposed of; but the name of an artist, an author, a musician, or a lawyer has never been regarded as a trade-name, and as such salable. The value of the names of such persons depends entirely upon their personal reputation, skill, and experience, and is indissolubly connected or associated with the owner. "There may, no doubt, be cases where the personal skill of an artist or artisan may so far enter into the value of a product that a trade-mark bearing his name would, or at least might, imply that his personal work of supervision was employed in the manufacture; and in such case it would be a fraud upon the public if the trade-mark should be used by other persons, and for this reason such a trade-mark would be held to be unassignable. It is, in any case, a question whether the use of the trade-mark would give to the public or to a purchaser a false idea as to who made the article; and a court of equity would not lend any active aid to sustain a claim to a trade-mark which would contain a misrepresentation to the public." Hoxie v. Chaney, 143 Mass. 592, 10 N. E. Rep. 713. In Messer v. Fadettes, 168 Mass. 140, 46 N. E. Rep. 407, 37 L. R. A. 721, the leader of an orchestra attempted to sell all her right, title, and interest in and to a musical organization or orchestra, together with the name by which it was designated,—the "Fadette Ladies' Orchestra,"—and it was held that the name was unassignable; that the use of it by the assignee would mislead and defraud the public, and for that reason the claim to have the assignment enforced would not be sanctioned by the courts. In Skinner v. Oakes, 10 Mo. App. 45, it was held: "If an author were to assign to another the privilege of publishing books with his name on their title page, or if a painter were to sell to another the privilege of placing the former's signature upon pictures painted by the latter, it cannot for a moment be supposed that any court would protect such supposed right, even as against the original assignor. This point is absolutely clear, both upon principle and authority." In Hegeman v. Hegeman, 8 Daly, 1, it was held: "When, however, the whole pecuniary value of a name is derived solely from the personal qualities of the one to whom the name belongs,—such as his skill, special knowledge, and experience,—or from the fact that the article is produced under his personal supervision, which imparts to it a special value, then the right to the name is not transmissible." It is useless to multiply authorities. The name "Sousa," in connection with the band, implies his skill, science, and art. Even as against him, the assignor of his name to another, the assignment cannot be enforced in a court of equity. To do so would be to lend ourselves to fraud and imposition upon the public, when it is our duty in every instance to protect them. The seventh and eighth assignments of error are also overruled.

NOTE.—The questions decided in the principal case are: First, that personal contracts, such as that described in the principal case, are disolved by the death of one of the parties; and that it does not alter the case, in that the contract must be carried out by a corporation to be formed in the future; second, that a contract for the use of a person's name in a theatrical company, who was not to be associated with the com-

pany, was a fraud on the public and would not be enforced. Contracts of a personal nature, depending upon personal skill or taste of the obligee, such, for instance, as the obligation of an author to prepare a book for publication, or a master to instruct an apprentice. Barter v. Burfield, 2 Strange, 1266. The contract to marry or any obligation to be performed by the contracting party in person (Siler v. Gray, 86 N. Car. 566)are not binding on the executor or administrator. So a contract to sell all the lumber manufactured by one party during five years, to average a certain number of feet per year, but stipulating no fixed quantity for any year, was declared a personal contract, dissolved by death of either party. Dickinson v. Calahan, 19 Pa. St. 231. And was also held in the case of a contract to manufacture a certain patented article and push the sale in a certain manner requiring personal skill. Smith v. Preston, 170 Ill. 179. And the contract between a firm and agent to employ him in their business for a term of years was held discharged by death of a member of the firm. Tasker v. Sheperd, 6 H. & N. 575. The death of one party to a contract does not operate as a revocation or discharge of his part of the agreement, where his obligation is such that it can be performed by his personal representative. Hawkins v. Bael, 18 B. Mon. (Ky.). 816, 68 Am. Dec. 755. If the contract is for the performance of personal services, requiring particular ability and skill, there is the implied condition that the contractor shall be alive and physically able to perform them. Warvell v. Phillips, 162 Mass. 390, 44 Am. St. Rep. 370. A written contract between a sewing machine company and W. recited the fact of a sale by the former to the latter of one hundred Howe machines, for the price of which W had given a series of notes, the company stipulating to accept on or before the maturity the amount due thereon in notes of subpurchasers, drawn to the order of W and guaranteed by him. The company was to ship to W a specified number of machines monthly, and W agreed to sell them within a specified territory, at the regular retail prices established by the company, and deal only in its machines. After fifteen machines were delivered W died. It was held that the contract was personal to W, and the further performance did not devolve on the administratrix on his estate. Howe Sewing Machine Co. v. Rosensteel, 24 Fed. Rep. 583, citing Robson v. Drummond, 2 Barn. & Adol. 303; Dickinson v. Calahan, 19 Pa. St. 227. In compromise and settlement of criminal and civil proceedings for fornication and bastardy, and breach of promise of marriage, A agreed to deliver her child to C, to discontinue both actions and release B from all claims and demands, in consideration of which B agreed to pay all costs in said cases, "to relieve A from any cost or expenses in the support and maintenance of said child, and see that it was well taken care of." Held, the contract was not personal to B, but could be enforced against his executors. Stumpp's Appeal, 116 Pa. St. 33, 8 Atl. Rep. 806. Contracts for personal services are subject to the implied condition that the party contracting to perform shall continue in health, and such contracts are revocable by his incapacity to perform. Powell v. Newell, 59 Minn. 406, 61 N. W. Rep. 325. The above was where a note was given to a physician for future services and the physician became ill, held the giver of the note was released from payment. When J agreed to furnish S with "six successive crops of hemp of his own raising, embracing each year all the hemp he can raise upon not less than one hundred, nor more than one hundred and sixty acres of land each year," it was held a personal contract and could not be enforced against J's executor. Schultz v. Johnson's Ex., 5 B. Mon. 497, citing Chitty Pldgs., Vol. 1, 58; Chitty on Contr. 98.

When S made a contract with W that W would deliver to him three car loads of coal each week from April 15, 1872, to October 15, 1872, at $3.75 per ton, and six car loads each week from October 15, 1872, to April 15, 1873, at $4.00 per ton. S died on October 11, 1872. Held that S's executor might enforce this contract if she choose, that the defendant could not avoid it. Smith v. Manf. Co., 83 Ill. 498, citing Parsons, Cont. 131; Saboni v. Kirkham, 1 M. & W. 418. If the performance of a contract becomes impossible by sickness or similar disability, the contractor may recover on a *quantum meruit* for what he did perform. Lalaman v. Pollard, 83 Me. 463, citing 1 Parsons, Cont. 524. In a contract for the performance of personal manual labor for a stipulated time, requiring strength and health, it must be understood to be an implied condition that strength and health remain. An actual inability to perform the labor arising from sickness at the commencement of the time, although it may not continue during the whole term contracted for, excuses performance. Dickey v. Linscott, 20 Me. 453. The act of God will excuse the non-performance of a duty created by law, but not one created by contract. School, etc. v. Danchy, 25 Conn. 530. The apparent exceptions to this rule, as where the performance of a contract is excused by the death of a party who was personally to perform, or the destruction of the specific subject matter of the contract, are rather cases of implied condition as to such contingency, than of absolute contracts discharged by act of God. The second question considered was the fact that the contract was against public policy. A number of such contracts have been heretofore spoken of in the Central Law Journal. Thus the agreement which leaves persons in charge with the performance of a trust to violate or betray it is void. 2 Cent. L. J. 63. A contract to sell skill or reputation in any profession is void. 2 Cent. L. J. 588. A contract by a friend and candidate to pay naturalization fees is void. 8 Cent. L. J. 332. A contract with one of a number of creditors to pay a *bonus* in consideration of his signature to a composition is void. 9 Cent. L. J. 49. Likewise to secure the pardon of an offender. 11 Cent. L. J. 479. A contract of a telegraph company discriminating against a telegraph company is void. 12 Cent. L. J. 506. Insurance by one who has no insurable interest or property is void. 14 Cent. L. J. 352. A contract in restraint of marriage is void. 20 Cent. L. J. 288. A contract for illegal combination is void. 28 Cent. L. J. 534. A contract in restraint of trade is void. 29 Cent. L. J. 63. A contract between husband and wife to cease quarreling is void. 29 Cent. L. J. 162. For definition of contract against public policy, see 29 Cent. L. J. 308.

WM. M. ROCKEL.

## BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE.

Members of the legal profession throughout the country are looking forward with no little interest to the appearance of the first volume of the Cyclopedia of Law and Procedure to be issued shortly. While the cyclopedic method of rounding up the law is far from being a new one, having been to some extent developed as far back as Viner's and Bacon's Abridgments, yet so many new and original features are in-

cluded in the plan of this work as to make it practically a novelty.

Lawyers are proverbially conservative, much given to clinging to the old things, and ever timid of parting from time-honored precedents. And nowhere has the evil effect of this ultra-conservatism been more apparent than in the making of law books. While the technical literature of the other learned professions has been keeping pace with the requirements of modern civilization the lawyer's books have been falling further and further behind, until the necessity for radical improvements in the methods of law writing has become decidedly apparent, even to those antiquated believers in general principles who deem a "case lawyer" beneath contempt. It is undoubtedly true that every lawyer who practices in the courts to-day is a "case lawyer," however unwilling he may be to admit it, and the text book that he wants is not one containing theoretical dissertations upon the law as it should be, and citing venerable cases, decided in the long ago. The ideal book to meet the demands of the modern lawyer must not only contain a concise and accurate statement of the law as it is, but must also cite all the authorities that have made the law what it is; it must not only treat all the law on a given subject, but must treat it all in one place, and must make that place easy of access to the busy searcher for knowledge; and, above all things, it must not only be up to date when published, but it must be capable of keeping step with the progress of the science.

All these things are promised, *inter alia*, by the publishers of the Cyclopedia of Law and Procedure, and therefore we feel that the appearance of their first volume will be a rather noteworthy event in legal circles. The most attractive feature of this work, from the book buyer's standpoint, is the plan of keeping it always abreast of the decisions by a simple and inexpensive system of annotation, whereby the continual appearance of "new editions" will be rendered unnecessary, or rather indefensible; it was always unnecessary. Without something of the sort the value of a legal text book is ephemeral to a degree, and the large percentage of practically useless books that load the shelves of every lawyer will bear eloquent testimony to the truth of the assertion.

Another highly laudable feature of the forthcoming book lies in the fact that there will be no splitting up of the law along an arbitrary line alleged to divide pleading and practice from substantive law. The whole of each topic will be treated under a single head, and in this way not only will a great amount of duplication be avoided, but many valuable cases will be saved that would otherwise fall down in the splitting process. The publishers count on saving so much space in this way that they are guaranteeing to complete their set in thirty-two volumes.

If the specimen pages sent out by the company are a fair sample of what the whole work will be, little will be left to be desired in the matter of quality. The subjects are minutely and accurately analyzed, the statements of the law are clear and concise, and the citations of authorities appear to be exhaustive. The practice of citing the American Decisions, Reports, and State Reports, and the unofficial reports of the West Publishing Company and the Lawyer's Co-operative Publishing Company, will lend an additional value to the work, as will also the innovation of indicating in the notes all cases containing adjudicated forms of pleading.

Especially striking among the articles already in print is one on "Accord and Satisfaction," edited by Hon. Seymour D. Thompson. If the other branches of the law are treated as fully and ably as this one, it is safe to predict that the Cyclopedia of Law and Procedure will quickly win a high place in the lawyer's library and affections. The publisher is the American Law Book Company, 120 Broadway, New York.

## JETSAM AND FLOTSAM.

### PARTNERSHIP—SALE OF BUSINESS GOOD WILL.

The English Court of Appeal, Chancery Division, has recently decided the following interesting question of partnership law in the case of Gillingham v. Beddon, in reference to one partner selling his interest in the business and good will; who, after doing so, attempted to induce customers of the old concern to change their patronage from the old concern to the new one, formed by the outgoing partner. Partnership articles provided that on the expiration of the partnership the partner who should give the largest sum (two-thirds of which should be paid in cash, and the remaining third in equal acceptances at four, eight and twelve months from such date) for the good will and assets of the partnership should be entitled to have the same made over to him accordingly, provided that nothing therein contained should prevent either partner from starting a similar business after the expiration of the partnership. The plaintiff purchased under the provisions of the articles, and the defendant having started a similar business claimed the right to send circulars to customers of the old firm soliciting orders. The plaintiff applied for an injunction to restrain him from so doing. Held, that an injunction must be granted.

Cozens-Hardy, J.: It is clear that the defendant has solicited customers of the old firm, and the question is whether he can lawfully do so. In my opinion he cannot. Trego v. Hunt (*ubi supra*) laid down that on the sale of the good will of a business there is an obligation imposed upon the vendor arising from an implied contract or possibly from the doctrine that a man must not derogate from his grant; that although he may carry on a similar business in the same place, he must not use the name of the old firm, which is part of the good will, and must not solicit the customers of the business. It has been argued that the points were decided in Pearson v. Pearson (*ubi supra*) and that this case comes within the second point, which was not overruled by the house of lords. There is here an express proviso that the sale of the good will is not to prevent either partner from starting a similar business in the neighborhood after the expiration of the partnership. But if that proviso were omitted there would have been nothing to prevent either partner from starting a similar business after the expiration of the partnership. Trego v. Hunt (*ubi supra*) decided that the vendor of a business could carry on business in the same neighborhood, although he could not solicit the customers. The proviso really does not do anything more than express what would have been the law even if the proviso had been non-existent. The true explanation of Pearson v. Pearson (*ubi supra*), is, I think, that given by Romer, J., in *Re* David and Mathews (*ubi supra*). I am only following Trego v. Hunt (*ubi supra*), and doing nothing inconsistent with Pearson v. Pearson (*ubi supra*), in granting the injunction asked for. Injunction allowed.—*The Justice of the Peace*, London.

EVIDENCE OF INTENT OF PARTIES.

Ever since parties were permitted to testify in litigated causes, the true philosophy of the law was persuasive with the courts that the question of intent of parties, when in issue, may be testified to by them, subject to the tests of a searching cross-examination. This was the law as to witnesses, not parties, when their intent was a question of fact in issue. So, in Miner v. Phillips, 42 Ill. 123 (1866), it was determined that in an action involving a charge of fraud imputed to a witness, it was permissible to ask him whether the challenged act was made in good faith, without going into particulars. The opposite party has a right on cross examination to ascertain all the particulars of the challenged transactions, and thus show that the act was not done in good faith. "This is the usual practice" said the court, "and we cannot see that it can work any hardship. It is generally recognized as correct practice to ask a general question of this character, leaving the other side to call for details, and the collateral circumstances of the transaction." In Watkins v. Wallace, 19 Mich. 76, an assignor was permitted to answer the question, "Why did you make the assignment?" The court holding that the evidence was admissible because the main inquiry was the intention, which is proved by circumstances, and because usually there is no other mode of proof. When the only person who knows the facts are accessible as a witness, his answer must necessarily be more direct evidence than any other. If there is any reason to suspect the witness' candor, the jury can make all the allowance called for by his position and demeanor. In Seymour v. Wilson, 14 N. Y. 567, which is a leading case (and where the judgment was reversed for excluding the question), it was held that on an issue of fact as to the *bona fides* of an assignment, a witness may be asked whether he made it to hinder or delay his creditors. This was also held in Forbes v. Waller, 25 N. Y. 439, where the intent of a party to make an assignment was inquired into as a competent question, and so the assignor in Griffin v. Marquand, 21 N. Y. 121, was permitted to state that he made the assignment to prevent a sacrifice of his property. In People v. Baker, 96 N. Y. which was a prosecution for false pretenses, the defendant, as a witness in own behalf, was permitted to testify that as to a certain payment he did not intend to defraud the prosecuting witness. He was also asked this question: "Was your intention, when you received moneys from time to time, from Mecker, to defraud him?" An objection to this question was sustained, and the objection was reversed. As the intent with which those moneys were received was one of the material inquiries, the court held that the accused should have been permitted to show that he did not receive them with any fraudulent intent. The same rule was also upheld in Fisk v. Chester, 8 Gray, 506. Intent as to residence or domicile. Hulett v. Hulett, 37 Vt. 581. Same. Danforth v. Carter, 4 Iowa, 230. Intent to give credit to defendant. Starin v. Kelly, 88 N. Y. 418; McKown v. Hunter, 30 N. Y. 625. Good faith in prosecution. Fiedler v. Darrin, 50 N. Y. 437. Usury. Lawyer v. Loomis, 3 Thomp. & C. 393. Malice in prosecution without cause. Miekey v. Burlington Ins. Co., 35 Iowa, 174. Meaning of an affidavit. The qualification of the rule is that a party cannot testify in his own behalf to his undisclosed intent, in order to alter the effect of that which is a matter of contract, representation or estoppel, on which the other party has a right to rely. Dillon v. Anderson, 43 N. Y. 231; Craighead v. Peterson, 72 N. Y. 279; Waugh v. Fielding, 48 N. Y. 681. Deceit. In Flower v. Brumbach, 131 Ill. 652, an attempt was made to prove by a party what he meant by an expression used in a letter to the other party, what he believed the other party meant by a certain letter written to him, and what he thought it necessary to state in answer thereto. The question was asked, "'Did you in answering this letter have in mind an intention to mislead Brumbach?' The question was held incompetent, because it was an effort to put a secret construction on a certain letter, and permit a witness to say what he intended, and what he did not intend by it. The letter was the only proper evidence of those facts." Citing Brant v. Gallup, 111 Ill. 487. An extension of the rule is that the purpose and policy of an act may be stated by a witness, who was present and cognizant of the whole transaction—as whether the delivery of money by one man to another was by way of payment or otherwise. See Nat. Bank of Metropolis v. Kennedy, 17 Wall. 19, and cases cited therein. For a full note on this subject see 21 Am. Repts. 314, annotation to Gordon v. Woodward, 44 Kan. 758.—*National Corporation Reporter.*

## HUMORS OF THE LAW.

"Your friends call you 'judge.' do they not?" asked the lawyer, frowning heavily at the witness.

"Yes, sir," the witness replied.

"No particular reason for calling you that, is there?"

"Well, sir, you may not believe it, but before I came to this State I held an honorable and responsible position on the bench for eighteen years."

"Where?"

"In a shoemaker's shop, sir."

## WEEKLY DIGEST

**Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**

1. ACCIDENT INSURANCE—Cause of Death.—An insurance policy provided that the insurance should not cover death resulting from intentional injuries inflicted by the insured or any other person; also that claimant under the policy should affirmatively show that death resulted from actual accident according to the policy. The holder of such accident policy died of a gunshot wound received in some manner which was not shown by the evidence. Held, that such showing made a *prima facie* case for recovery under the policy, since the courts would not presume murder or suicide, but would presume that the death was accidental, nothing to the contrary being shown.—JENKIN V. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA, Cal., 63 Pac. Rep. 180.

2. ADMIRALTY—Action Against City for Injury to Vessel by Collision.—The maritime law, and not the local law, governs in determining the liability of a city for injury to another vessel by a fire-boat owned by the city and in the custody and management of its fire department, which is negligently handled while hastening to assist in putting out a fire raging in a building at the head of a dock.—ROBERT W. WORKMAN V. MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, U. S. S. C., 21 Sup. Ct. Rep. 212.

3. APPEAL—Acceptance of Benefits. — While it is a general rule that a party cannot appeal from a judgment after he has to any extent accepted the benefits thereof, yet, where a decree consists of two distinct parts, the receipt of benefits under one portion will not bar an appeal from the other portion, where such appeal cannot in any manner affect that portion under which the benefits were received.—WISHEK V. HAMMOND, N. Dak., 84 N. W. Rep. 387.

4. ATTACHMENT—Bonds—Damages.— The mere seizure of a debtor's book of accounts under a writ of attachment creates no lien in favor of the attaching creditor on the accounts, and hence proof of such seizure is not proof of damages entitling plaintiff to judgment in an action on the indemnifying bond given in the attachment suit.—MCKINNEY V. SWEET, Miss, 28 South. Rep. 939.

5. ATTORNEYS—Admission to Bar.— A practicing attorney in good standing in the courts of record of a sister State, a territory, or a foreign country, and having an interest in a cause pending in any of the courts of this State, may, in the discretion of such courts, and as a matter of courtesy, be permitted to appear in said court for some of the purposes of such cause.—IN RE ADMISSION TO BAR, Neb., 84 N. W. Rep. 612.

6. ATTORNEY AND CLIENT—Champertous Contract.—A contract by attorneys agreeing to prosecute an action against a railroad company, by which they were to have one-half of the amount recovered, and by which, also, plaintiff was to pay them the money advanced in the cause, together with their personal expenses relating thereto, is not champertous and void. —WALLACE V. CHICAGO, M. & ST. P. RY. CO., Iowa, 84 N. W. Rep. 662.

7. BILLS AND NOTES—Consideration.—This is an action on a promissory note between the makers and payee thereof, wherein the defense of want of consideration is interposed. On a retrial of the issues of fact in this court it is found as a fact that such note is without consideration, and it is accordingly held that plaintiff cannot recover thereon. — ANDREWS V. SCHMIDT, N. Dak., 84 N. W. Rep. 568.

8. BILLS AND NOTES—Consideration.—There is consideration for a note where, all the parties to a litigation over the estate being anxious to amicably terminate it, and, the attorney for one of the plaintiffs therein refusing to consent to a dismissal till his fee was paid, one of the defendants told said plaintiff, who had not money to pay his attorney, that if he would dismiss the case she would give him a note to pay his attorney, and would pay the note when she got her money from the estate, and this was agreed to, and steps were immediately taken towards, and resulting in, dismissal, after some delay, largely occasioned by said defendant.—SPIELBERGER V. THOMPSON, Cal., 63 Pac. Rep. 132.

9. CARRIERS OF FREIGHT—Limitation — Fraud.—The limitation, in a contract of shipment of a horse, of the carrier's liability to $100, the "released value of the horse" named in the contract, rendering the contract void, under Code, § 2074, providing no contract shall exempt a railway from liability of a common carrier which would exist had no contract been made, fraud of the shipper in making representation to secure a cheaper rate of freight will not prevent his proving the full value of the horse.—LUCAS V. BURLINGTON, C. R. & N. RY. CO., Iowa, 84 N. W. Rep. 673.

10. CARRIERS OF GOODS—Loss by Fire.—A railroad company is liable, at least as a warehouseman, for goods transported by it and remaining in cars still subject to its orders in the yard of a terminal association under a contract with the terminal association for "terminal facilities" for "the handling of its trains and the handling and care of its freight," without any provision that the terminal association will store cars, but only to furnish "storage room" for the cars necessary to the carrier's business, with a provision also that the railroad company shall repair its own cars damaged in making and breaking up trains, except those damaged outside of the yards set apart for its use, and that these shall be repaired by the party causing the damage, while the cars in the yards are not subject to be moved by the terminal association, by the orders of the consignee, or any other person until instructions to do so are given by the railroad company, and it, in its dealings with other carriers, assumes to have the possession and control of such cars.—HUNTTING ELEVATOR COMPANY V. BOSWORTH, U. S. S. C., 21 Sup. Ct. Rep. 183.

11. CARRIERS OF PASSENGERS — Ticket. — Where defendant's agent sold plaintiff a ticket over connecting lines, which contained a provision on its face that the defendant acted only as agent, and was not responsible beyond its own line, and the condition was not signed by plaintiff, his acceptance and use of the ticket estopped him from taking advantage of his omission to sign.—ST. CLAIR V. KANSAS CITY, M. & B. R. Co., Miss., 28 South. Rep. 957.

12 CHATTEL MORTGAGE—Lien—Crop. — A mortgage of personal property not then owned by the mortgagor will not attach to such property as a lien thereon until the mortgagor acquires some title or interest therein.—BIDGOOD V. MONARCH ELEVATOR CO., N. Dak., 84 N. W. Rep. 561.

13. CONTRACT — Action — Undisclosed Principal. — Where a witness was improperly permitted to state the contents of a written instrument, the error is cured by the immediate introduction of the instrument, which corresponds in all respects with the statements of the witness.—STEWART V. GREGORY, CARTER & CO., N. Dak., 84 N. W. Rep. 563.

14. CONTRACT—Agreement by Partnership Not to Engage in Business.—Defendant and his brother owned a lumber yard in partnership, which they sold to plaintiff, and agreed to execute a contract not to start a lumber yard in the city for three years, and in pursuance of such agreement such a contract was signed by both members of the firm. Held, that defendant, by engaging in the prohibited business as an individual, was not liable for a breach of contract, since the contract was joint, and did not prohibit the partners from engaging in the business as individuals.—STREICHEN V. FEHLBEISEN, Iowa, 84 N. W. Rep. 716.

15. CONTRACT — Building Contract — Performance.—Where a contract for the construction of a creamery provided that during its erection "the board of managers shall confer" with its builder, and the manager and directors were present during its construction, the fact that they did not confer with the builder, or object to defects and omissions, does not relieve the

latter from a substantial compliance with the plans and specifications under which it had agreed to construct the building.—CORNISH, CURTIS & GREENE CO. v. ANTRIM CO-OP. DAIRY ASSN., Minn., 84 N. W. Rep. 724.

16. CORPORATIONS—Liability of Stockholders for Unpaid Subscriptions.—A citizen of one State, who becomes a stockholder in a corporation created under the laws of another State in which there are in existence statutes providing for winding up the affairs of insolvent corporations on a creditor's petition through the agency of a receiver, assumes the obligation to respond to any demand that may be made for any unpaid balance on a subscription to the capital stock, by the proper court of that State, since his contract relations depend on the law of that State.—FISH v. SMITH, Conn., 47 Atl. Rep. 712.

17. CRIMINAL EVIDENCE—Rape—Character. — Where evidence of the general good character and reputation of defendants and of their good reputation for chastity is introduced in a prosecution for rape, it is error to instruct that the jury may consider such facts, if found to be facts, in determining whether the witnesses for the State have been mistaken or have testified falsely, since such evidence is not limited to the purpose of discrediting the State's witnesses.—STATE v. WOLF, Iowa, 84 N. W. Rep. 536.

18. CRIMINAL LAW—Civil Rights—Jury — Negroes.—Though the question as to whether negroes were excluded from a grand jury indicting a negro solely because of their race and color is brought to the trial court's notice in a manner other than by a proper plea, it is such court's duty to hear proof thereon.—LEWIS v. STATE, Tex., 59 S. W. Rep. 1116.

19. CRIMINAL LAW—Deposit in Lieu of Bail.—Where, pursuant to Code, § 5534 *et seq.*, permitting defendant to make a deposit of money in lieu of bail, and regulating its disposition, a third person furnishes the money, he will be deemed to have done so in compliance with the statute, which contemplates that the deposit shall be made by defendant; and hence the money thereafter can only be returned to defendant, to whom alone the statute provides it shall be paid, and may therefore be applied, as authorized by section 5524, to pay a fine imposed on him, refunding to him the surplus, if any.—STATE v. OWENS, Iowa, 84 N. W. Rep. 529.

20. CRIMINAL LAW — False Pretenses—Obtaining Signature to Deed.—Under Code, § 5041, making it an offense for any person by false pretenses to obtain the signature of any person to any written instrument the false making of which would be forgery, the procuring by false representations of the signature to a deed purporting to convey realty, though executed in blank as to grantee, is indictable, since the false making of such a deed would be forgery.—STATE v. TRIPP, Iowa, 84 N. W. Rep. 548.

21. DECEIT—Evidence — Bank Statement.—A published report of the financial condition of a bank, in which the resources and liabilities are equally inflated, is not such a material misrepresentation as will support an action for deceit, unless by such report the condition of the bank is made to appear to be better than it actually is.—GERNER v. YATES, Neb., 84 N. W. Rep. 566.

22. EQUITABLE ASSIGNMENT—Order — Acceptance.—An order on a debtor by his creditor directing him to pay his indebtedness to the person named therein, and an acceptance thereof by the debtor, operate as an equitable assignment of the debt.—BAYLOR v. BUTTERFASS, Minn., 84 N. W. Rep. 640.

23. EVIDENCE—Declarations—Preferring Creditors.—As against creditors of a deceased husband seeking to subject to their claim property which he had conveyed to his wife, declarations of his that he was indebted to her, that the property was bought with her money, and that he held the title as trustee for her, are admissible, having been made before his indebtedness to such creditors was contracted, and without reference thereto.—GERMAN INS. CO. OF FREEPORT, ILL., v. BARTLETT, Ill., 58 N. E. Rep. 1075.

24. EVIDENCE — Partnership—Admission of Declarations.—After a *prima facie* case as to partnership is made, the admissions and conduct of the several partners in the course of the partnership business are admissible against the others.—DENNIS v. KOLM, Cal., 63 Pac. Rep. 141.

25. FEDERAL COURTS — Action Against Receiver—Removal into Federal Court.—The bare fact that the appointment of a receiver was by a federal court does not make all actions against him cases arising under the constitution or laws of the United States which he can remove on that ground into a federal court, where his appointment was made under the general equity powers of courts of chancery, and not under any provision of the federal constitution or laws, and his liability depends on general law, and his defense does not rest on any act of congress.—GABLEMAN v. PEORIA, ETC. RY. CO., U. S. S. C., 21 Sup. Ct. Rep. 171.

26. FEDERAL COURTS — Right to Raise Constitutional Question.—The objection that persons may be deprived of their rights without due process of law under the Massachusetts Torrens act for land registration, because it provides for adjudicating the rights of certain classes of persons who are notified only by posting notices, registered letters, or publication, and for the registration of dealings with the land after the original registration, cannot be raised, so as to give jurisdiction on writ of error to the Supreme Court of the United States, by a person who is not affected by these provisions of the act because he has the requisite notice.—TYLER v. JUDGES OF THE COURT OF REGISTRATION, U. S. S. C., 21 Sup. Ct. Rep. 206.

27. FRAUDS, STATUTE OF—Part Performance—Implied Promise.—In an action to recover the value of real property conveyed in pursuance of an agreement by defendant to reconvey on plaintiff's performance of certain conditions, a copy of an agreement, which it was alleged defendant had agreed to sign, but did not, was annexed to the declaration. The execution of the agreement was alleged to be the consideration for the land conveyed. Held, that since the declaration set out oral agreements by defendant, which he refused to perform, and which could not be enforced under the statute of frauds, he was liable on an implied promise to pay for the property, and therefore a demurrer to the declaration was improperly sustained.—PEABODY v. FELLOWS, Mass., 58 N. E. Rep. 1019.

28. FRAUDS, STATUTE OF—Sales — Conditional Delivery.—The intent of the parties to a sale of personalty is a fact which should always be considered by the jury in determining whether a conditional delivery of property alleged to be sold constitutes such a delivery as will take the transaction out of the statute of frauds, and an instruction which eliminates that fact from the consideration of the jury is erroneous.—THOMPSON v. FRAKES, Iowa, 84 N. W. Rep. 703.

29. GAME—Possession of Game Taken in Open Season.—Where defendant came into possession of a quail on the 30th day of December, and retained it in his possession until February 5th, he is liable to punishment therefor under Burns' Rev. St. 1894, § 2209 (Horner's Rev. St. § 2107), providing that whoever has in his possession any quails from the 1st of January of any year to November 10th of the same year shall be fined, etc.—SMITH v. STATE, Ind., 58 N. E. Rep. 1044.

30. GARNISHMENT—Validity.—It is the settled doctrine of this court that one can be garnished only in the State where the debt is payable, if that be the place of residence of his creditor.—BULLARD v. CAMERON, Neb., 84 N. W. Rep. 604.

31. GIFTS—Sale—Notice.—Where one refuses to accept the money which his wife's daughter owes him, but, on his wife insisting that he should accept it, he

tells her to take it and use it herself, and she does take it from a loan thereafter obtained on the daughter's property, the gift is to take effect at once, and so is a valid gift *inter vivos*.—WILLIAMS v. TAM, Cal., 63 Pac. Rep. 133.

32. GUARANTY — Appeal — Sales on Commission.—Where defendant sold goods on commission for plaintiff, and agreed to redeem all notes taken by them in payment which were not signed by responsible persons, an instruction that if, at the time the notes were given, the maker or makers were in fact persons of well-known responsibility, but since became insolvent, such insolvency would not render defendants liable, was proper.—AULTMAN, MILLER & CO. v. ROEMER, Iowa, 84 N. W. Rep. 668.

33. GUARANTY — Continuing — What Constitutes.—Where plaintiffs furnished groceries to a party running a hotel on the order of defendant to them to kindly furnish such party with groceries, containing no restrictions or limitations, the liability of defendant continued until he gave notice of some kind to plaintiffs that he would no longer be liable, since the guaranty acted as a continuing one.—DOYLE v. NICHOLS, Colo., 63 Pac. Rep. 123.

34. HABEAS CORPUS — Interference With Sentence of State Court.—Interference with the execution of the sentence of a State court by writ of *habeas corpus* from a federal court, on the ground that the State law under which the prosecution was had upon an information is invalid, is properly refused where that question has not been raised in the State court, either by way of defense to the prosecution or by application for writ of *habeas corpus*,—especially when a decision against the validity of prosecutions by information might result in the liberation of many convicts.—DAVIS v. BURKE, U. S. S. C., 21 Sup. Ct. Rep. 210.

35. HIGHWAYS—Adverse Possession — Injunction.—Where a landowner erects a fence on what he supposed to be the correct line of a highway, and remains in peaceable possession of the inclosed land for 30 years, he acquires title by adverse possession to such line, as against the county, and may enjoin an interference with the fence by a road supervisor, who claims that it incloses a portion of the highway.—AXMEAR v. RICHARDS, Iowa, 84 N. W. Rep. 686.

36. HUSBAND AND WIFE—Contract Between—Relinquishing Dower.—Since Horner's Rev. St. 1897, § 5115, abolishes all disabilities of married women to make contracts, save as otherwise provided, and no statute prohibits a contract between a husband and wife, a contract by a wife to sign a deed of the husband's real estate, thereby releasing her inchoate interest therein, in consideration of his agreement to pay her a certain sum from the proceeds of the sale, was valid.—DAILEY v. DAILEY, Ind., 58 N. E. Rep. 1065.

37. HUSBAND AND WIFE—Estates by Entirety.—Sess. Laws 1893, p. 170, authorizing a married woman to convey her property to the same extent as her husband can property belonging to him, having removed the wife's common-law disability to convey her interest in an estate of the entirety with her husband, where a married woman mortgaged such an estate, and the death of the husband removed his right of survivorship, the mortgage was a valid lien on the fee.—HOWELL v. FOLSOM, Oreg., 63 Pac. Rep. 116.

38. INDIAN LANDS—Effect of Treaty—Estoppel.—An Indian tribe, by accepting without objection a congressional grant whose boundaries are identical with those mentioned in the treaty in pursuance of which the grant was made, and conform to the lines described in an earlier treaty so far as they are contained within the limits of the United States, is estopped to claim under the earlier treaty any lands not within such limits.—UNITED STATES v. CHOCTAW NATION, U. S. S. C., 21 Sup. Ct. Rep. 149.

39. JUDGMENT—Enforcement—Injunction.—An independent action in equity to enjoin the collection of a judgment will not lie in a case such as this, where it appears from the facts alleged in the complaint that the plaintiff had an adequate remedy at law by a motion to vacate such judgment under section 5299, Rev. Codes 1899. In disposing of such motions, courts are empowered to administer equitable relief, and apply equitable principles to the facts involved.—KITZMAN v. MINNESOTA THRESHER MFG. CO., N. Dak., 84 N. W. Rep. 585.

40. JUSTICE OF THE PEACE — Adjournment. — On a trial of a cause before a justice of the peace, when the pleadings are filed by consent of parties at a time to which the cause is adjourned after the return day, either party, as a matter of right, is entitled to an adjournment of one week from the day on which the pleadings are closed.—JOHNSON v. LITTLE, Minn., 84 N. W. Rep. 648.

41. JUSTICES OF THE PEACE—Review—Writ of Error.—A question as to whether there was sufficient evidence to warrant a judgment by a justice of the peace cannot be reviewed on writ of error in the district court, as the only remedy is by appeal.—ANTHES v. BOOSER, Iowa, 84 N. W. Rep. 516.

42. LANDLORD AND TENANT—Adverse Possession.—Before a tenant can initiate an adverse holding, and set the statute of limitations running in his favor, he must either yield up possession, or else distinctly repudiate the relation created by the lease, and bring home to the lessor knowledge of the fact that the tenancy has been terminated.—ROSS v. MCMANIGAL, Neb., 84 N. W. Rep. 610.

43. LICENSES—Highways.—One who has merely the privilege of quarrying and taking rock from land, for which payments are made to the owner by way of stumpage, and not by way of rent, is a licensee, and not a tenant.—INHABITANTS OF TOWN OF ROCKPORT v. ROCKPORT GRANITE CO., Mass., 58 N. E. Rep. 1017.

44. LIMITATION OF ACTIONS — Remedies in Other States.—Where default is made in the payment of a firm note executed in California by a partner residing there, and the other partner is a resident of New York, the right of action, as against him, accrues in New York, and not in California; and if no action is brought on the note in New York within the time prescribed by the statutes of limitation of that State, the holder cannot maintain an action against him in Nevada by reason of Comp. Laws, § 3786, providing that when a cause of action has arisen in any other State, and by the laws thereof an action there cannot be maintained by reason of lapse of time, no action shall be maintained in Nevada.—LEWIS v. HYAMS, Nev., 63 Pac. Rep. 136.

45. MALICIOUS PROSECUTION—Malice.—To entitle a plaintiff to prevail in an action to recover damages for malicious prosecution, it is necessary to prove that he has been prosecuted by the defendant either civilly or criminally, and that the prosecution terminated in his favor. Further, that such prosecution was malicious, and without probable cause, and resulted in his damage.—MERCHANT v. PIELKE, N. Dak., 84 N. W. Rep. 574.

46. MALICIOUS PROSECUTION — Probable Cause.—It appearing from undisputed facts that defendants had probable cause for suing out an attachment, the court should have so instructed the jury, as the question as to what facts constitute probable cause is for the court.—MARK v. CHRISTIAN, Ky., 59 S. W. Rep. 1092.

47. MANDAMUS—City Auditor—Voluntary Payment.—*Mandamus* will not lie to compel a city auditor to draw a warrant pursuant to an ordinance appropriating money to pay the claim of R, and directing the auditor to draw his warrant in favor of R for such sum, his duty not being ministerial merely under the city charter providing that every demand shall be presented to him for approval, and that he shall "satisfy himself whether the money is legally due."—ROONEY v. SNOW, Cal., 63 Pac. Rep. 155.

48. MASTER AND SERVANT—Contributory Negligence.—Where the planing machine at which plaintiff worked was reasonably safe for the purposes for which it was used, and in perfect running order, and plaintiff was familiar with its operation and construction, and his injuries were sustained by unnecessarily stooping over an arm and reaching under the table to remove shavings, he cannot recover for the injury.—GEORGE v. ST. LOUIS MFG. CO., Mo., 59 S. W. Rep. 1097.

49. MASTER AND SERVANT—Negligence.—The master is liable to third persons for injury growing out of his employee's negligence. If he (the master) is not in fault, he may recover from his employee the damages which he has been made to pay, if the accident was caused by the negligence or carelessness of the employee while in the master's service.—COSTA V. YOACHIM, La., 28 South. Rep. 992.

50. MECHANIC'S LIEN — Complaint—Notice—Partnership.—Where a partnership performs work under a contract, and seeks to obtain a mechanic's lien therefor, it is not necessary that the notice of the lien should state that the claimants were partners, where it shows that the persons composing the partnership jointly claimed the lien.—DUCKWALL V. JONES, Ind., 58 N. E. Rep. 1055.

51. MECHANIC'S LIEN — Priority—Mortgage.—Under section 4793, Rev. Codes, a mechanic's lien may be had for labor and material used in the construction of a building, which will have priority over a real estate mortgage executed and recorded prior thereto, when the building for which such labor and material was furnished was in process of construction when the mortgage was executed. The right to such lien, however, may be lost by a failure of the lien claimant to assert it.—BASTIEN V. BARRAS, N. Dak., 84 N. W. Rep., 559.

52. MORTGAGES — Absolute Deed. — Where a deed absolute in form was intended as a mortgage, a second deed, made by the grantee, at the request of the grantor, to a third party, who paid to such grantee all claims held by him against the grantor, for which the first deed was security, is merely an assignment of such claims and the security therefor.—MOTT V. FISKE, Ind., 58 N. E. Rep. 1084.

53. MORTGAGE — Construction — Rents Secured — A mortgage which expressly recites that it is given to secure prompt payment of rent according to the terms of a certain written lease, and names the amount secured, which amount corresponds with the amount agreed in the lease to be paid as rent, does not secure rents which become due after the expiration of such lease under a tenancy arising by implication of law from holding over after such lease expired.—FIELDS V. MOTT, N. Dak., 84 N. W. Rep. 555.

54. MORTGAGES—Debt of Husband.—Where a mortgage appeared on its face to have been given to secure a debt of the husband, the burden is on the wife to show that it included property belonging to her, though her joinder in the instrument was that of a mortgagor, and not limited to relinquishment of dower.—BURGESS V. BLAKE, Ala., 28 South. Rep. 963.

55. MORTGAGES—Record—Lien.—An attaching creditor is not a subsequent purchaser for value, within Code, § 2925, providing that no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded in the recorder's office of the county in which the real estate lies; and hence an unrecorded mortgage, or other instrument creating a lien, will take precedence over a subsequent attachment.—REA V. WILSON, Iowa, 84 N. W. Rep. 589.

56. MORTGAGES—Transfer of Property Mortgaged.—An owner of adjoining lots, after mortgaging them, conveyed one of them to defendant, subject to a mortgage which defendant was to assume as part of the consideration. Subsequently such owner conveyed the other lot "subject to the mortgage," which lot came by mesne conveyances to plaintiff. Held, that plaintiff could not by bill in equity compel defendant to pay the mortgage; for, as the owner did not avail himself of the estoppel against defendant to enhance the consideration which he received by conveying the last lot as unincumbered, plaintiff could not claim such estoppel, when it was not necessary to give it to him to preserve any of such owner's rights.—PEARSON V. BAILEY, Mass., 58 N. E. Rep. 1028.

57. MUNICIPAL CORPORATIONS—Defective Streets—Notice.—In an action against a city for injuries occasioned by a defect in a street, which it was averred caused complainant's horse to run, throwing him from his vehicle, a notice not indicating any place as defective, except where the injury occurred, is insufficient where the defect which caused the injury was some 300 hundred yards distant, though it was contended that the same defect existed for the whole of such street, since it gave no sufficient information as to the locality of the defect.—MILLER V. CITY OF SPINGFIELD, Mass., 58 N. E. Rep. 1014.

58. MUNICIPAL CORPORATIONS—Police Regulations—Liability for Officer's Acts.—A person arrested without cause by the officers of a municipal corporation, and confined in the lockup over night, without food or water, or protection from the cold, cannot recover from the corporation for injuries to his health, caused by the negligence of the authorities in not keeping the lockup in proper condition, since the police regulations of a municipal corporation are enforced by it.—LAHNER V. INCORPORATED TOWN OF WILLIAMS, Iowa, 84 N. W. Rep. 507.

59. MUNICIPAL CORPORATIONS—Special Taxes—Lien.—Plaintiff in ejectment purchased land at a sale on special execution issued on a judgment rendered in his favor in a suit on special tax bill, pursuant to the charter of St. Louis, art. 6, § 25, providing that a special tax bill shall become a lien on the property charged therewith, and may be collected of the owner of the land. The record owner of the land was dead, and at the time of her death was a non-resident, of which fact plaintiff was ignorant, and publication was had against such record owner and her grantor, but her heirs were not made parties to the suit. Held, that plaintiff did not acquire title at such sale, since, as the record owner was dead, and her heirs were not parties, the owners of the land were not before the court, and their title was not devested thereby.—PERKINSON V. MEREDITH, Mo., 59 S. W. Rep. 1099.

60. NEGLIGENCE—Liability of Agent.—This is an action to recover damages for injuries to a team of horses, which were received in a barbed-wire fence at a point where said fence crossed a trail upon which the team was being driven, which trail had previously been in common use. The fence inclosed certain lands owned by a non-resident, whose agent defendant was for the purpose of leasing and collecting rent. It is held, under the facts stated in the opinion, that defendant's control of the premises where the injury occurred was not broad enough to render him liable for its safe condition.—KUHNERT V. ANGELL, N. Dak., 84 N. W. Rep. 579.

61. NEGLIGENCE — Unguarded Excavation — Proximate Cause.—Plaintiff was riding horseback in a public street. From some unknown cause the horse took fright and backed some thirty or forty feet, until he stepped into a wagonway which, extending into the street, had been made by defendants for the purpose of moving earth from a cellar, which they were excavating on their own lots, up to the street surface. The plaintiff then fell or jumped off, and was pushed into the cellar by the horse. The wagonway and the cellar were not guarded or inclosed at the point where the accident occurred. Held, that the fright of the horse, and not the failure to guard or inclose the excavation, was the proximate cause of plaintiff's injuries.—LA LONDE V. PRAKE, Minn., 84 N. W. Rep. 726.

62. PARTIES—Intervention—Assignment of Claim.—Code, § 3594, providing that any person who has an interest in the matter in litigation, in the success of either of the parties, or against both, may become a party to an action between other persons, does not authorize one to whom the plaintiff has made an absolute assignment of his entire claim, after suit has been commenced thereon, to intervene therein, since the proper remedy is to ask to be substituted as plaintiff.—BANK OF COMMERCE V. TIMBRELL, Iowa, 84 N. W. Rep. 519.

63. PARTNERSHIP — Dissolution — Notice.—A retiring partner is not released from liability on an obligation securing the bank account of the partnership, where the only notice which the bank had of the dissolution was such as might be implied from the change in the firm name signed to checks, and on making inquiry it was informed by a remaining partner, who had been local manager of the partnership's business, that there had been some change of the firm's business at other points, but none so far as its business at that point was concerned.—BYERS V. HICKMAN GRAIN CO., Iowa, 84 N. W. Rep. 500.

64. PHYSICIANS AND SURGEONS—Statutory Provisions—Constitutionality.—Code, § 2579, requiring that examination before the State board of medical examiners, a certificate of graduation from a medical school, or a showing that the physician has been in practice in the State for five consecutive years, three of which shall have been in one locality, shall be required, to show qualification to practice medicine, is not repugnant to Const. art. 1, § 6, providing that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens.—STATE V. BAIR, Iowa, 84 N. W. Rep. 532.

65. PLEADING—Reply.—The office of a reply is to deny the facts alleged in the answer as a defense, or to allege matters in avoidance of such defense not inconsistent with the cause of action set out in the petition.—PLUMMER V. ROHMAN, Neb., 84 N. W. Rep. 600.

66. PRINCIPAL AND AGENT—Authority to Lease.—The authority of an agent authorized to lease his principal's land extends not alone to what is necessary therefor, but to that which is "proper, usual, and reasonable," as well as necessary.—DURKEE V. CARR, Oreg., 68 Pac. Rep. 117.

67. PRINCIPAL AND AGENT—Death of Agent.—Where an agent of an insurance company, who is employed for a period of years under a contract entitling him to commissions on future premiums paid on policies obtained by him, dies, his executor cannot recover such commission on premiums paid after his death, since it terminated the contract.—MILLS V. UNION CENT. LIFE INS. CO., Miss., 28 South. Rep. 954.

68. PRINCIPAL AND AGENT—Special Agent—Pledge.—Where a debtor pledges bonds to his creditor to secure certain indebtedness under a contract which authorizes the creditor to repledge the bonds for the purpose of floating the secured notes or renewals thereof, and the creditor pledges the bonds for his own benefit, the debtor, on paying the secured notes, may recover the bonds from the second pledgee, since such pledgee is chargeable with notice of the limitation on the creditor's authority.—MATTESON V. DENT, Iowa, 84 N. W. Rep. 710.

69. PRINCIPAL AND SURETY—Contribution Among Joint Makers.—Where a joint maker of a note, after paying the share of another maker, accepts the latter's notes for such share without the consent of a third maker, coupled with an extension of time for payment, such third maker becomes a surety as to the maker obtaining an extension, and is released from contribution as to such share, though the maker executing such note for his *pro rata* share was insolvent, and such third maker was not injured by the transaction.—CLARK V. DANE, Ala., 28 South. Rep. 960.

70. PRINCIPAL AND SURETY—Extension of Time—Consideration.—Where the time of payment of a note payable, without interest, or on before one year after date, was extended after maturity at the request of the principal, no agreement to pay interest during such period of extension could be implied, in the absence of a stipulation therefor; and hence there was no consideration for such extension, which would alter the original contract, and thus relieve the surety, who had not consented to any alteration of the note.—HENSLER V. WATTS, Iowa, 84 N. W. Rep. 666.

71. PRINCIPAL AND SURETY—Reservation of a Lien.—A surety on a note given by the purchaser at a receiver's sale is not released by the receiver's failure to reserve a lien on the property sold, as he is directed to do by the order of the court, when the surety signs an apparently unconditional obligation, and fails to notify either the receiver or his principal that he signs upon condition of the retention of such lien.—JOYCE V. AUTEN, U. S. S. C., 21 Sup. Ct. Rep. 227.

72. PROCESS—Attachment—Substituted Service.—An officer's return showing substituted service of a writ of attachment made one day before the return day of the writ is a fatal defect.—REYNOLDS V. MARQUETTE CIRCUIT JUDGE, Mich., 84 N. W. Rep. 628.

73. RAILROAD COMPANY — Crossing — Contributory Negligence.—A traveler who attempts to drive over a dangerous railroad crossing without looking for approaching trains before placing himself in a situation of danger from which he can neither safely advance nor retreat, is guilty of contributory negligence as a matter of law, though he cannot see such trains, by reason of obstructions, without going in advance of his team to look; and he is not excused from taking such precautions by the failure of persons in charge of a train to give the signals required by statute.—CHICAGO & E. R. CO. V. THOMAS, Ind., 58 N. E. Rep. 1040.

74. RES JUDICATA.—It is held that a former judgment between the ancestor of the plaintiffs and the defendant is conclusive in favor of the plaintiffs upon the fact that they are the owners of the land for the recovery of which this action was brought.—WAGNER V. CITY OF ST. PAUL, Minn., 84 N. W. Rep. 726.

75. SALES—Action for Breach — Damages.—In a suit for breach of contract, in failing to deliver personal property in accordance with a bill of sale, the measure of damages is the fair market value of the property, less the amount of a note given for the purchase money.—WELCH V. URBANY, Iowa, 84 N. W. Rep. 497.

76. SALES—Guaranty.—Where defendant, in ordering ladies' jackets, exacted from plaintiff a guaranty that they would fit his customers, the contract was not changed by a printed headline in plaintiff's bill of the goods requiring notice at once if they did not conform with the terms of the purchase.—SAMUELS V. SHIPLEY, Iowa, 84 N. W. Rep. 687.

77. SALE — Novation.—The debtor's note for an open account does not, in the absence of an agreement, novate the debt. In obtaining an extension of time and giving a new note without obtaining a surrender of the old note, there was no novation. The obligation itself has never changed; only the evidence of the obligation has changed.—HUGHES V. MATTES, La., 28 South. Rep. 1006.

78. SALE—Rescission — False Representations.—A purchase of a machine cannot be rescinded because of false representations that S is the local agent of the seller, and would keep repairs for the machine, repairs being kept by another, and it not being shown that the purchaser would suffer by S not being such agent.—AULTMAN, MILLER & CO. V. NILSON, Iowa, 84 N. W. Rep. 892.

79. SALES— Warehouse Receipts — Fraud.—The seller of whisky cannot have the contract canceled for fraud, where warehouse receipts for the whisky transferred by him to the purchaser have been sold for

value to one who had no notice of the fraud, or that the whisky had not been paid for.—THEIS v. CANMANN, Ky., 59 S. W. Rep. 1098.

80. SALE OF PERSONALTY — Contract—Damages.—All damages, present and prospective, resulting from the total breach of an executory contract for the sale of property, may be recovered in a single action; the complaint therein containing appropriate allegations. —RATHBONE, HAIR & RIDGEWAY CO. v. WHEELIHAN, Minn., 84 N. W. Rep. 638.

81. TAXATION—Stocks and Bonds.—Stocks and bonds of a foreign corporation, owned at the time of his death by a resident of California, where his estate is being administered, and inventoried by his executrix as part of the estate committed to her charge, is there taxable to her, under Const. art. 13, § 8, as property "owned or claimed" by her, though testator had pledged it for a loan in another State, and it still remains so pledged.—STANFORD v. CITY AND COUNTY OF SAN FRANCISCO, Cal., 63 Pac. Rep. 145.

82. TRESPASS—Alteration of Mortgage.—Where defendants justified their entry of plaintiff's close and a seizure of his goods under a chattel mortgage after breach of condition, and plaintiff claimed the mortgage was void because of a material alteration, an instruction that, if defendants had made a material alteration without knowledge of the other parties, the mortgage was void, and defendants had no right to take the property, and if, in so doing, they used force on the person of plaintiff, defendants were liable, was proper, since defendant's right to enter plaintiff's close depended on the continued operation of the mortgage.—BACON v. HOOKER, Mass., 58 N. E. Rep. 1078.

83. USURY—Notes—Comity—Lex Loci Contractus.—Under Code Tenn. 1884, § 270, making interest in excess of 6 per cent. per annum usury, and section 5628, making usury a criminal offense, a note for the purchase price of land in Mississippi, bearing 8 per cent. interest, dated and payable in Tennessee, will not be held usurious and void in Mississippi, by reason of the Tennessee law alone, it being valid in Mississippi, since comity does not require the courts of one State to enforce the criminal statutes of another.—KENDRICK v. KYLE, Miss., 28 South. Rep. 951.

84. WILLS — Construction — Legacies. — A testator neither at the time of his will nor of his death, had money or personal property sufficient to pay the legacies, nor any one of them. His first direction was that they be paid out of his "estate," the principal legacy being left to his "faithful friend and cousin," and the others to his grandchildren. Lastly he directed that the "rest, residue and remainder" of the estate, 'both real and personal, of every kind," should go to his surviving children; this being the only disposition made of realty. Held, that the legacies were a charge on the land.—GORMAN v. MCDONNELL, Ala., 28 South. Rep. 964.

85. WILLS—Contest—Evidence.—Where the question whether a will was witnessed in testator's presence is in issue, it is not error to allow a witness to testify that he was familiar with the room in which the will was witnessed, and that he had heard the witnesses testify as to the position of the testator when the will was witnessed, and from his knowledge of the room he would say that testator could have seen the witnesses and the paper, since it is the statement of a fact, rather than the expression of an opinion.—BURNEY v. ALLEN, N. Car., 37 S. E. Rep. 501.

86. WILLS—Election—Dower.—Where a testator, after making a will containing no provision for his wife, executes a codicil by which he makes his entire estate chargeable with her support during her life, meaning her board, lodging, clothing, and all desired comforts suitable to her declining years, she is not bound to make an election, but is entitled to dower in addition to the provision made for her support, and on her death her one-third interest in lands devised descends to her heirs.—BENTLEY v. BENTLEY, Iowa, 84 N. W. Rep. 676.

87. WILL—Life Estate.—A husband devised certain real estate to his wife, to be used by her as a homestead, or for her benefit, if rented, so long as she should live. The will also charged upon her the payment to testator's sister of one-half the rental value, and authorized her, at her option, to sell the real estate, and divide the proceeds equally between herself and his sister. The testator's widow occupied the land as a homestead until her death. Held, (1) that the will conveyed a life estate; (2) that the interest devised to the sister ceased with the death of the widow; (3) that the testator's heirs take the land.—ANDERSON v. ETTRIDGE, Mich., 84 N. W. Rep. 613.

88. WILL — Life Estate — Contingent Remainders. — Where testatrix devised a life estate in land to her husband, and directed that on his death it should be sold, and the proceeds divided among certain heirs named, and the life tenant and all the heirs are represented in an action for the sale of the land before the death of the life tenant, which would be beneficial to the contingent interests, the superior court has power to decree the sale.—MARSH v. DELLINGER, N. Car., 37 S. E. Rep. 494.

89. WILL—Presumption.—A testator, after directing the payment of his debts, devised the residue of his estate to his wife, "to have and to hold during her natural life, should she outlive myself, though, should she die first, to be as hereinafter mentioned." By the next clause of the will, testator provided "that all my property, both personalty and realty, shall be divided as follows" (naming the persons who were to take, and the share of each). Held, that, though testator's wife survived him, the estate upon her death will not go to testator's heirs, as undevised estate, but to the remainder men named in the will; the presumption being that testator did not intend to die intestate as to any part of his estate.—TRUSTY v. TRUSTY, Ky., 59 S. W. Rep. 1034.

90. WILLS—Separate Papers—Advancement.—Where a son, having received advances to the amount of $15,000, claimed an equitable deduction therefrom by reason of his father's promise to pay him certain commissions, which promise was indefinite as to the manner of its performance, a provision in the father's will treating the $15,000 as money advanced and chargeable to the portion of the son was binding on the son.—IN RE MOORE, N. J., 47 Atl. Rep. 731.

91. WITNESSES—Competency—Parties. — Defendants as to whom the action has gone to judgment at the time they testified as to the issue between plaintiff and the other defendant are not parties, within Code, § 4604, which prohibits a party to an action testifying to a transaction between him and a person deceased at the time of the examination, against the executor of such deceased person.—CLINTON SAV. BANK v. UNDERHILL, Iowa, 84 N. W. Rep. 667.

92. WITNESSES—Confidential Communications to Attorney.—Where the question whether certain notes given in the firm name for the debt of one partner are provable against the firm in an insolvent proceeding is in issue, it is not error to refuse to admit a communication made by one partner to an attorney employed by the other in insolvency proceedings for the firm, while he is engaged in such employment, though the communication was not made for the purpose of obtaining advice, since such communications are privileged.—NATIONAL BANK OF THE REPUBLIC v. DELANO, Mass., 58 N. E. Rep. 1079.

93. WITNESS—Drains — Establishment. — A remonstrance may be made to the construction of a ditch by the board of commissioners on the ground that the damage will exceed the benefits to be derived therefrom, since the statute authorizing such drains requires the damage to be paid out of assessments for benefits.—TRITTIPO v. BEAVER, Ind., 58 N. E. Rep. 1084.